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**Statement on S. 1771,
Colorado Ute Settlement Act Amendments of 1998
before the
Senate Committee on Indian Affairs and the
Senate Committee on Energy and Natural Resources
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Thank you for the invitation to testify on S. 1771, the Colorado Ute Settlement Act Amendments of 1998. I appreciate the opportunity to present the Administration's views on this legislation.

Mr. Chairmen, S. 1771 would amend the Colorado Ute Indian Water Rights Settlement Act of 1988 (Public Law 100-585). If enacted, this bill would direct the Secretary of the Interior to provide for the construction of three facilities or features as components of a modified Animas-La Plata Project (Public Law 90-537), including a 260,000 acre-feet Ridges Basin Reservoir, a Durango pumping plant, and a Ridges Basin inlet conduit. It would direct the Secretary to allocate through the use of these facilities an average annual depletion of water for municipal and industrial uses of 48,390 acre-feet for the Southern Ute Indian Tribe, Ute Mountain Ute Tribe, Navajo Nation, San Juan Water Commission and Animas-La Plata Water Conservancy District; to make available at the request of the Animas-La Plata Water Conservancy District of Colorado or the LaPlata Conservancy District of New Mexico an annual average depletion of 6,010 acre-feet of water for agricultural irrigation; and, to transfer, upon the request of the State Engineer of the State of New Mexico, all of the interests of the Department of the Interior under a New Mexico State Engineer permit that were reserved to fulfill the purposes of the original Animas-La Plata Project. The measure would make non-reimbursable all construction costs for the three facilities identified in S. 1771 and allocable to the Navajo Nation and to each Tribe's municipal and industrial water allocation. It would limit the capital payment obligations of the San Juan Water Commission, Animas-LaPlata Water Conservancy District, and the State of Colorado for the non-tribal municipal and industrial water supplies attributable to its three constructed features to \$29 million. It acknowledges that the uncommitted portion of the State's cost sharing obligations provided in the Animas-La Plata Cost Sharing Agreement, dated June 30, 1986, shall remain available to assist in the funding of other facilities and features of the original Animas-LaPlata Project. The measure would require the Secretary to pay the annual operation, maintenance and replacement costs allocable to the Tribes' municipal and industrial water allocations from the Animas-La Plata Project or the Dolores Project until that water is first used by the Tribe or is used pursuant to a water use contract with the Tribe. S. 1771 includes a Congressional finding that applicable environmental laws are satisfied with respect to any review of the impacts of such construction on environmental and cultural resources for its three features without additional action, review, analysis or public comment on the modified Animas-La Plata Project. If enacted

and implemented, S. 1771 would provide the final elements of a Water Rights Settlement Agreement for the Colorado Ute Indian Tribes (Tribes). Both Ute Tribes have stated that this arrangement would constitute an acceptable solution to them, at least in the near term.

Background

The Animas-La Plata Project, located in La Plata and Montezuma Counties in southwestern Colorado and in San Juan County in northwestern New Mexico, was described in a 1979 Bureau of Reclamation (Reclamation) Definite Plan Report, in a 1980 Final Environmental Statement, in a 1992 Draft Supplement to the Final Environmental Statement, and in a 1996 Final Supplement to Final Environmental Statement on the Project. This original Project would divert flows of the Animas, La Plata, and San Juan Rivers (by exchange) for irrigation, municipal, and industrial uses. It would also provide for fish and wildlife preservation, recreation facilities, and a cultural resources program.

The Project was authorized by the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537), as a participating project under the Colorado River Storage Project Act of April 11, 1956 (Public Law 84-485). That authorization was based on the feasibility report of the Secretary of the Interior transmitted to the U.S. Congress on May 4, 1966.

In 1988, Congress passed the Colorado Ute Indian Water Rights Settlement Act of 1988 (Public Law 100-585) supplementing the authorization of the Animas-La Plata Project and adopting language to implement the 1986 Colorado Ute Indian Water Rights Final Settlement Agreement. The Southern Ute Indian and the Ute Mountain Ute Tribes, headquartered in Ignacio and Towaoc, Colorado, respectively, have reservation lands within the Animas and La Plata Rivers drainages, as well as in drainage basins of other streams tributary to the San Juan River. The Colorado Ute Indian reservations were created in 1868, resulting in the Tribes having potential priority dates for their water rights that precede the priority dates for most, if not all, of the non-Indian water rights.

For years, the Tribes pursued an equitable settlement of their water rights claims in these river drainages. In the early 1980's, discussions were initiated to achieve a negotiated settlement of the claims. After negotiations, the Tribes and other parties signed the Final Settlement Agreement on December 10, 1986. Specific legislation to implement the Settlement Agreement was enacted by the U.S. Congress on November 3, 1988. The Settlement Agreement provided the Southern Ute and Ute Mountain Ute Tribes with development funds in the amount of \$20 million and \$40.5 million, respectively.

The Federal government and the State of Colorado have fully funded these development funds. The Ute Mountain Utes used some of this money to construct a pipeline to supply up to 1 thousand acre-feet of potable water per year to Towaoc. In addition, Reclamation funded the

construction of a \$128 million project consisting of canals, laterals, and drains to deliver water the Dolores Project to the Ute Mountain Ute reservation and has made 25 thousand acre-feet of irrigation water available to the Tribe annually through these works. The Agreement also settled the Tribes' water rights claims in a number of streams that are secure whether or not the Animas-LaPlata Project goes forward.

The 1986 Settlement provided certain benefits to the Tribes, including a supply of water in certain quantities, the construction of the Animas-LaPlata Project (in combination with other substantial benefits noted above) would enable the Federal government to reach a final resolution of the Tribes' water rights claims on the Animas and LaPlata Rivers. However, all parties recognized that construction of the Animas-LaPlata Project would depend upon compliance with other applicable laws, including the National Environmental Policy Act and the Reclamation statutes. The Agreement did not guarantee that the Federal government would be able to construct this project for the Tribes.

In the event that Reclamation does not complete certain major project features by January 1, 2000, the Settlement requires the Tribes, in consultation with the United States as trustee, to elect among the following alternatives: (1) to retain the project reserved water rights claims on the Animas and LaPlata Rivers; (2) to renegotiate their water rights without a guarantee that the project would be built; or, (3) to reopen their litigation with regard to the Animas and LaPlata Rivers. Reclamation acknowledged in its Fiscal Year 1998 budget justification that it is no longer possible to meet the January 1, 2000 objective.

The Animas-LaPlata Project has been the focus of controversy and litigation for many years. Although Congress has passed two statutes authorizing construction, the project has not been built because of a variety of environmental, cultural resource, financial, economic, and legal concerns. These include disputes regarding the adequacy of environmental documentation, the status of repayment and cost-sharing agreements executed in the late 1980s, and concerns regarding compliance with New Mexico water quality standards. In 1996, in an attempt to resolve the continuing disputes surrounding the original project, Colorado Governor Roy Romer and Lt. Governor Gail Schoettler convened the project supporters and opponents in a process intended to seek resolution of the controversy involved in the original Animas-La Plata Project and to attempt to gain consensus on an alternative to the original Animas-La Plata Project. Although the Romer/Schoettler Process did not achieve consensus, the process produced two major alternatives. S. 1771 is similar to and based upon one of those alternatives.

The other alternative developed during the Romer/Schoettler Process proposed to provide water to the Tribes through the purchase of irrigated lands and other associated water rights near the existing Ute Reservations in southern Colorado and would use or purchase water from existing projects or from expanded projects and delivery systems for the purpose of providing Indian-only water. This alternative is not contained in S. 1771. The Tribes have rejected this alternative.

The Administration supports a final settlement of the water rights claims of the Tribes. The Administration would like especially to acknowledge the Tribes' effort in the Romer/Schoettler Process, which reflected a willingness on their part to reexamine basic premises and undertake a study into the available scientific and environmental information. The Administration welcomes these efforts and supports continued progress that will enable the Tribes to obtain a water supply for their present and future needs. In this regard, the administration fully understands the importance of ensuring that the Tribes receive more than just paper water rights. While the Administration strongly opposes S. 1771, it is committed to continue a dialogue with the Tribes and others in pursuit of the best means to obtain a just and final settlement for the Tribes.

The Status of Other Project Features

S. 1771 makes no effort to reconcile the original Animas La Plata Project with the modified Project and the features it directs the Secretary to construct. It appears that S. 1771 would simply divide the original Animas-LaPlata Project into a different phasing than proposed in the preferred alternative in the 1996 FSFES. If this is true, S.1771 would enable the original project to be built at some point in the future when and if additional water were to become available from the San Juan River Basin. As a result, this modified Animas-LaPlata Project raises renewed concerns over the same unanswered, critical environmental, fiscal, financial, economic and legal issues that have kept the project from coming to fruition for a decade.

S. 1771 does not amend the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537) and the 1988 Settlement Act or reconcile the proposed construction of the three facilities identified in S. 1771 with the 30 other facilities incorporated into the original Animas La Plata Project. While the project proponents have moved away from the original Animas La Plata Project, it remains an authorized project and the only Congressionally-sanctioned vehicle for delivering water to the Tribes. There is nothing contained in S. 1771 that fills in the gap between what is publicly known about the original Animas La Plata Project and what we can only assume, guess or surmise about a modified Animas La Plata Project. This is a serious deficiency. Even if these unknowns and deficiencies in description, detail and design were corrected, the modified Animas La Plata Project as outlined by S. 1771 presents one vital practical question: How is the Secretary of the Interior expected to deliver water to the Tribes for M&I purposes with only these three facilities and no pipelines to deliver water?

In summary, S. 1771 mandates the construction of the first segment of a large unspecified project, which may or may not resemble the original Animas-LaPlata Project. It is difficult to see how Reclamation can complete the environmental documentation or economic analysis for such a modified project and determine whether such a proposal would be the best overall way to meet tribal, fiscal, economic and environmental objectives, without knowing what might follow the initial segment. Accordingly, the search for a new solution should not be limited to a single alternative. For example, it may be that a smaller, Indian-only alternative that is less expensive, more environmentally benign and targeted in delivering water to the Tribes may succeed in

obtaining a final settlement, where S. 1771 may not.

Adequacy of Existing Studies to Support a Modified Animas-LaPlata Project

The original Animas-LaPlata Project's major features include two off-stream dams and reservoirs (Ridges Basin and Southern Ute Dams and Reservoirs); two major pumping plants (Durango and Ridges Basin Pumping Plants); three major water conveyance systems (Dry Side and Southern Ute Inlet Canals and Ridges Basin Inlet Conduit); and two diversion dams on the La Plata River (La Plata and Southern Ute Diversion Dams). It was described in a 1979 Definite Plan Report, in the 1980 Final Environmental Statement (INT FES 80-18) (1980 FES), and in the 1996 Final Supplement to the Final Environmental Statement (FSFES).

In April 1996, Reclamation published its Final Supplement to Final Environmental Statement (FSFES) on the Project. The purpose of the FSFES was to provide additional information concerning environmental effects initially described in the 1980 FES. It offered new information relevant to environmental concerns and having a bearing on the proposed action or its impacts. The FSFES also incorporated revisions as a result of public input since publication of the Draft Supplement Final Environmental Statement published in 1992. Additional information describes changes in the Project's environmental effects since 1980 as a result of design refinements, new information, Indian water rights settlement, and additional compliance requirements. Reclamation undertook the FSFES to analyze new information and to determine if refined, additional, or new environmental mitigation measures are needed if the Project as proposed were constructed. The document also is intended to provide information for compliance with Project land certification requirements, the Clean Water Act (CWA), and Reclamation's Indian Trust Assets (ITAs) policies and procedures.

The FSFES contains a preferred alternative for the original Animas-La Plata Project that would store water pumped from the Animas River into Ridges Basin Reservoir and would store water diverted from the La Plata and Animas Rivers in Southern Ute Reservoir.

The total water supply developed by the Project would average 191,230 acre-feet annually for agricultural irrigation and municipal and industrial (M&I) uses. About 111,130 acre-feet of Project water would be delivered to 17,590 acres of non-Indian land currently being irrigated and 48,310 acres of Indian and non-Indian land not presently being irrigated. An annual M&I supply of 40,000 acre-feet would be available to non-Indian communities in Colorado and New Mexico. An annual supply of 40,100 acre-feet of M&I water would be provided to the Southern Ute Indian Tribe, Ute Mountain Ute Tribe, and Navajo Nation.

Reclamation participated in surveys of endangered fish in the San Juan River from 1987 to 1989. In February 1990, Reclamation reinitiated formal consultation with the U.S. Fish and Wildlife Service (Service) under Section 7 of the Endangered Species Act (ESA) based upon new information about Colorado squawfish. The Service then issued a draft Biological Opinion that

stated the Project is likely to jeopardize the continued existence of Colorado squawfish and that no reasonable and prudent alternatives (RPAs) were identified to offset jeopardy to the endangered fish. From June 1990 through March 1991, Reclamation consulted with Federal, State, Tribal, and private experts and agencies to develop an RPA that would offset jeopardy to the endangered fish and allow construction of the Project to begin.

The Biological Opinion issued by the Service on October 25, 1991, contained an RPA which would allow construction of several Project features (including Durango Pumping Plant, Ridges Basin Inlet Conduit, Ridges Basin Dam and Reservoir, and other features) and initial annual water depletions for the Project of 57,100 acre-feet. At the same time, an approximately 7-year research study of endangered fish in the San Juan River (7-year research study) would be conducted, and Navajo Dam would be operated to replicate the natural hydrograph of the San Juan River and provide flows needed for the research period. Subsequently, consultation was reinitiated to address such new information as designation of critical habitat for endangered fish and listing of the Southwestern Willow Flycatcher. That consultation concluded with a final Biological Opinion and an RPA on the endangered fish from the Service dated February 1996, allowing an initial average annual water depletion of 57,100 acre-feet. Other requirements of this RPA are generally similar to those of the previous RPA. The seven-year research studies have been completed and provide new information about the needs of the endangered fishes and critical habitat in the San Juan River. This information, along with new hydrology information on the San Juan River, needs to be evaluated by the Service to determine if additional measures are necessary to avoid jeopardy to endangered fishes in the San Juan River.

As it did with regard to the original Animas-La Plata Project in September 1979, Reclamation typically provides Congress with a definite plan report (planning report) prior to a project receiving Congressional authorization to initiate construction. Among other things, a planning report must document economic feasibility and financial viability. The September 1979 report has not been updated to address a modified Project as set forth in S. 1771 or possible alternatives.

As noted above, the modified Project proposed in S. 1771 is scaled down from the original Animas-La Plata Project. There are changes in the water allocation among users, differences in the amount and timing of diversions from the Animas River, different return flow assumptions with respect to the Ute Indian water, among other changes. It is important to assess adequately the feasibility, financial responsibilities, benefits and costs and environmental impacts of such changes. The Administration believes it is essential to analyze these issues. For example, Reclamation knows that the cost of Ridges Basin Dam as provided for in S. 1771 could be reduced by as much as one-half if a reservoir sufficient to hold only the Indian M&I water were created. Such a reservoir may not provide certain fish and wildlife or recreation benefits, but the Administration believes that such a change to the modified Animas-LaPlata Project proposal should be analyzed in light of its potential cost savings. There appears to be a need to allow for exploration of a variety of alternatives means to deliver water to the Tribes, including alternative dam sizes, pumping capacities, and various configurations as well as possible non-structural

alternatives and other tools available to meet the Tribes' needs, so that potential trade-offs and opportunities can be understood by Congress and the public at large.

Circumvention of Environmental Laws

The Administration believes that as written Section 3(c) would circumvent critical environmental laws, including the Endangered Species Act, Clean Water Act, and National Environmental Policy Act. The Administration strongly opposes any Congressional finding that applicable environmental laws have been satisfied with respect to environmental and cultural resources for the three features of a modified Animas-LaPlata Project described in S. 1771. Any waiver of these laws for a modified Animas-LaPlata Project would be unwise. In the end, the Congress, the public, the Tribes and the Nation will be better served by compliance with the applicable environmental laws.

Reclamation anticipates that focused and further analysis under the National Environmental Policy Act would be necessary because the modified Animas-La Plata Project that would be authorized in S. 1771 is different than that configured in the 1996 Final Supplement to the Final Environmental Statement. In addition, further Endangered Species Act consultation would be needed to consider the results of the seven-year studies that have been completed recently and the effects to river hydrology resulting from a modified project. Reclamation and the Service are prepared to move expeditiously on this analysis and to complete any additional studies through Indian Self Determination Act agreements with the Ute Tribes.

Cost Sharing and Cost Indexing

S. 1771 would exempt the modified Animas-LaPlata Project from the basic requirements of Reclamation laws that are designed to ensure economic feasibility and appropriate financing of Reclamation water projects. The Administration strongly opposes the waiver of these requirements.

On August 15, 1985, the U.S. Congress in Public Law 99-88 appropriated \$1 million for design and construction of the original Animas-LaPlata Project. The use of those funds was contingent upon the completion by June 30, 1986, of a binding, Federal/non-Federal cost-sharing agreement satisfactory to the Secretary of the Interior. Consequently, in late 1985, the Project proponents and the States of Colorado and New Mexico entered into negotiations for a cost sharing agreement. The Federal and non-Federal entities signed the Cost Sharing Agreement on June 30, 1986, and the Settlement Agreement on December 10, 1986. A principal element of the Cost Sharing Agreement and the Indian water rights settlement agreement was dividing construction of the Project into two phases, Phases I and II, and associated cost-sharing obligations. The cost of constructing Phase I would be shared by Federal and non-Federal Project participants. Subsequently, Phase I was divided into Stage A and Stage B to accommodate the existing depletion limit of 57,100 acre-feet arising from endangered species concerns, while allowing for the possibility of additional water availability pending the outcome of the 7-year research study on endangered fish. Phase I, Stage A of the original Animas-La Plata Project was designed to have independent utility even if Phase B is never completed. Construction of Phase II would be the

responsibility of non-Federal Project participants. In addition, the Settlement Act provided for the establishment of a Tribal Development Fund and other project arrangements. It also specifies that the Tribes, under provisions of Federal law, can lease or temporarily dispose of water to the extent permitted by State and Federal laws, interstate compacts, and international treaties.

Section 3(a)(3) of S. 1771 would limit the capital payment obligations for the San Juan Water Commission, Animas-La Plata Water Conservancy District and the State of Colorado for the nontribal municipal and industrial water supplies attributable to the three features included in the modified Project to \$29 million. Section 4 (b) acknowledges that the uncommitted portion of the State of Colorado's cost sharing obligations provided in the Cost Sharing Agreement shall remain available to assist in the funding of other facilities and features of the original Animas-La Plata Project.

The proposed cap on the financial contribution of non-Indian beneficiaries is contrary to long-standing Reclamation law and policy that requires non-Indian M&I water users to pay or repay all costs allocated to serving them. For example, the 1986 cost-sharing agreement for the original Animas-LaPlata Project required the non-Indian M&I water users and beneficiaries to adhere to Reclamation law and policy and pay all of their allocated costs. By contrast, S. 1771, would cap the obligations at about 10.8 percent of the estimated project costs, including funds provided on their behalf by the State of Colorado. Under such an arrangement, the Federal taxpayers would bear a disproportionate financial burden.

S. 1771 would further increase the Federal government's cost-share by not allowing adjustments for ordinary construction cost increases and inflation. Specifically, the bill does not include indexing language to adjust the repayment obligations from 1998 price levels plus or minus such amount, if any, as may be justified by reasons of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the types of construction involved herein.

Addressing Concerns of the Navajo Nation

The Navajo Nation's water rights in the San Juan Basin have not been quantified and the United States cannot allow those rights to be compromised through a process that could have the effect of distributing additional depletions from the original or a modified Animas-LaPlata Project among non-Indian stakeholders at the expense of the Nation. Any legislation addressing water rights in the San Juan Basin must ensure that any depletions will not compromise the Navajo Nation's rights to waters of the San Juan River and its tributaries, nor its ability to secure water for the Navajo Indian Irrigation Project.

S. 1771 raises additional concerns regarding the proposed transfer of the Department of the Interior's water rights in New Mexico under New Mexico Engineer Permit No. 2883. In particular, the legislation does not clearly provide that the proposed transfer shall not affect application of the Endangered Species Act and other federal law requirements for the use of this

water and shall not detrimentally impact the Navajo Nation's unquantified rights to water in the San Juan River.

Ute Mountain Ute On-Farm Project

Subsection 4(a)(2) of the Bill provides that nothing in these amendments shall affect "the obligation of the Secretary of the Interior to deliver water from the Dolores Project and to complete the construction of the facilities located on the Ute Mountain Ute Reservation described in several appropriations Bills." As written, subsection 4(a)(2) could be construed to create an obligation for the Department to deliver water from the Dolores Project and to construct facilities for delivery of water on the Ute Mountain Ute Reservation.

The Administration does not support this effort to bootstrap an authorization for such on-farm project. The Department does not recognize an obligation to construct an on-farm project for the Ute Mountain Ute Tribe nor is there existing authorization for appropriations for such a project. This position was carefully presented in letters from John Duffy, Counselor to the Secretary, to Judy Knight-Frank, Chairperson of the Ute Mountain Ute Tribe, on May 19, 1994, February 21, 1995, and May 31, 1995.

Conclusion

The Administration is hopeful that Congress and the Administration can identify a better way to provide water to Colorado Ute Indian Tribes and settle their water rights claims. We strongly oppose S. 1771, which would impede the search for a better solution.

The Administration recognizes that Colorado Ute Indian Tribes' demonstrated flexibility by their willingness to accept less water than would have been available under the 1988 Settlement Act is significant. We welcome continuing discussions with the Tribes on the best ways to effect water delivery to meet their present and future needs. There are many voices seeking this end and numerous options and tools available to Congress and the Administration to achieve meaningful results. We want to engage the Tribes in that dialogue in hope of achieving resolution.

This concludes my remarks on S. 1771. I would be pleased to answer any questions you may have.